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In The

Supreme Court of the United States

RANDE H. LAZAR,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

18 U.S.C. § 3731 requires certification from "the United States attorney" before the federal government can appeal a district court order suppressing evidence in a criminal case. Does § 3731 require certification from *the* United States Attorney, as the Ninth Circuit has held, or is certification from an *Assistant* U.S. Attorney sufficient, as the Eighth Circuit has held and the Sixth Circuit held below?

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PETITION FOR CERTIORARI

Dr. Rande Lazar respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is published at 604 F.3d 230. It is reprinted in the Appendix at App. 1. The opinion of the District Court is unpublished, and it is available at App. 28. The Magistrate's Report and Recommendation is unpublished, and is available at App. 38.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on May 4, 2010, and the Sixth Circuit denied rehearing en banc on September 2, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

18 U.S.C. § 3731 states:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or

granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

The provisions of this section shall be liberally construed to effectuate its purposes.

STATEMENT

This is a case about the procedures that the United States Department of Justice must follow when seeking to appeal a district court order suppressing evidence in a criminal case. 18 U.S.C. § 3731 requires that before such an appeal can be made, "the United States attorney" must "certif[y] to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding." Certification imposes a procedural requirement of review by a senior official to ensure that the Department of Justice files interlocutory appeals only in appropriate cases. *See United States v. Herman*, 544 F.2d 791, 794 (5th Cir. 1977).

On October 9, 2002, agents searched two medical offices in Memphis, Tennessee. Both of the offices were part of a business run by Dr. Rande Lazar, M.D., a physician who is the Petitioner in this case. App. 4. In 2004, criminal charges were filed against Dr. Lazar for a range of alleged crimes relating to health care fraud. After charges were filed, Dr. Lazar filed a motion to suppress the evidence seized during the searches.

Magistrate Judge Diane K. Vescovo held a day-long hearing on the warrant and its execution at which the Assistant United States Attorney in charge of the case, Kevin Whitmore, testified as a witness. App. 38-39. Magistrate Judge Vescovo entered an order recommending that the fruits of the search be suppressed because the warrants used to execute the

searches were unconstitutional. App. 59-60. District Judge Bernice B. Donald adopted Magistrate Judge Vescovo's factual findings and issued an opinion granting the motion to suppress on February 15, 2008. App. 37.

The procedure used by the Government to appeal the adverse decision is the subject of this petition. On April 14, 2008, the Government filed a notice of appeal from the District Court's order granting the motion to suppress. App. 65-66. The Government re-filed the same notice of appeal six weeks later. App. 63-64. Both of the notices of appeal included the following certification by Assistant United States Attorney Kevin Whitmore: "The United States certifies that this appeal is not taken for purpose of delay, and that the evidence suppressed by the district court's order is substantial proof of facts material to the trial of this case." App. 63, 65.

The United States Attorney of the Western District of Tennessee, David Kustoff, did not make the required certification. Nor did the notice of appeal include any documentation that Assistant United States Attorney Whitmore had been appointed the Acting United States Attorney. The name of the United States Attorney appears only in passing: As with all court filings by an Assistant United States Attorney, the signature line formally states that it is in the name of the United States Attorney. App. 64, 66. However, the certification was not actually made by the United States Attorney.

On appeal, the Petitioner argued that the Government's failure to file a certification by the United States Attorney violated § 3731. The Sixth Circuit disagreed, ruling that certification by an Assistant United States Attorney such as Whitmore was sufficient to satisfy § 3731. App. 25-26, n.11. ("As to defendant's contention that certification signed by an AUSA such as Whitmore – as opposed to the United States Attorney – cannot satisfy § 3731, we reject such a requirement. . . ."). The Sixth Circuit reasoned that the purpose of the § 3731 certification was satisfied by Justice Department policy requiring decisions to file criminal appeals to be approved by the Solicitor General:

> As the government points out, United States Attorney's Offices must obtain permission to appeal adverse rulings to the U.S. Courts of Appeals: The Criminal Division of the Department of Justice reviews the case and prepares a memorandum for the Solicitor General of the United States, who makes the final decision on whether to appeal.

App. 26, n.11. The Court of Appeals added that its conclusion was "particularly appropriate" given the section's express interpretive guidance that it be "liberally construed to effectuate its purposes." *Id.* The Court of Appeals then affirmed in part and reversed in part the district court's order suppressing the evidence. App. 26.

Judge Kethledge filed a concurring opinion that noted the inappropriateness of the Assistant United

States Attorney who testified at the hearing (and who also signed the § 3731 certification) writing and signing the appellate brief before the Sixth Circuit. App. 27. On September 2, 2010, the Sixth Circuit denied the petition for rehearing. App. 61.

REASONS FOR GRANTING THE PETITION

This petition asks the Court to address a simple but recurring question that arises whenever the United States loses a motion to suppress in the District Court and then files an appeal: Does 18 U.S.C. § 3731 require a certification from *the* United States Attorney for the district, or does certification from an *Assistant* United States Attorney satisfy the statute?

The Court should grant the petition for certiorari to review this question for three reasons. First, the circuit courts are divided on the question. The Ninth Circuit has held that § 3731 requires the signature of the United States Attorney. In contrast, the Sixth Circuit below held that the signature of an Assistant United States Attorney suffices. The Eighth Circuit has agreed with the position taken by the Sixth Circuit. Given the significant attention that this issue has received in the Courts of Appeals, the Court should grant certiorari to resolve the disagreement among the circuits.

Review is also warranted because the question is important. The certification requirement is not

merely a paperwork requirement. Rather, it responds to concerns that the Justice Department might abuse its authority to file interlocutory appeals to introduce unnecessary delay into a criminal case. Circuit courts have repeatedly stressed the importance of the § 3731 certification requirement. Several circuits have also expressed significant frustration with repeated failures among Justice Department lawyers to satisfy the statute in a timely way.

Finally, the decision below is incorrect. The plain language of § 3731 states that "the United States attorney" must certify the appeal. This is the exact phrase, with the exact capitalization, that Congress used when it created the position of United States Attorney. The Sixth Circuit's decision ignores the plain text of § 3731 in favor of a policy argument that the Sixth Circuit believes is satisfied by current Justice Department policy. This approach effectively gives the Justice Department the option of complying with the statute. It effectively rewrites the statute Congress wrote. This interpretation is wrong and should be rejected.

I. THE CIRCUIT COURTS ARE DIVIDED ON WHETHER 18 U.S.C. § 3731 REQUIRES CERTIFICATION FROM THE UNITED STATES ATTORNEY.

(a) The History and Purpose of the § 3731 Certification Requirement. Section 3731 was designed to overturn the traditional rule that the Government

cannot file an interlocutory appeal from an adverse ruling in a criminal case. *See United States v. Scott*, 437 U.S. 82, 85 (1978) (citing *United States v. Sanges*, 144 U.S. 310 (1892)). Its predecessor statute was originally enacted in 1907, and it gave the United States only a limited right to seek a writ of error from any decision dismissing an indictment on the basis of "the invalidity, or construction of the statute upon which the indictment is founded." *Scott*, 437 U.S. at 85. As late as the 1960s, the United States could not file an interlocutory appeal challenging a district court's order granting a motion to suppress. *See Di Bella v. United States*, 369 U.S. 121, 131 (1962).

The current version of the statute was enacted in 1971, when Congress considerably expanded the Government's right to appeal adverse rulings. *See United States v. Wilson*, 420 U.S. 332, 337-38 (1975). As currently drafted, the statute gives the Government the statutory authority to file an interlocutory appeal when the United States loses a motion to suppress. Congress limited this grant of power with a procedural restriction designed to avoid abuses. To file an appeal under § 3731 following a district court order suppressing evidence, "the United States attorney" must certify to the district court "that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding." 18 U.S.C. § 3731. This limitation was imposed to recognize the traditional "prudential concern that individuals should be free from the harassment and vexation of unbounded litigation by

the sovereign." *Arizona v. Manypenny*, 451 U.S. 232, 246 (1981).

Understanding the certification requirement requires understanding the three types of federal prosecutors authorized by federal law: United States Attorneys, Assistant United States Attorneys, and Special Attorneys. 28 U.S.C. §§ 541-43. Each judicial district has one United States Attorney who serves as the lead federal prosecutor for that judicial district. The United States Attorney is nominated by the President and must be confirmed by the United States Senate. 28 U.S.C. § 541(a). The United States Attorney serves for four years and may be removed only by the President of the United States. 28 U.S.C. § 541(c).

In contrast, Assistant United States Attorneys are the regular career attorneys that make up the bulk of federal prosecutors in U.S. Attorney's Offices. Assistant United States Attorneys are appointed by the Attorney General of the United States "when the public interest so requires." 28 U.S.C. § 542(a). They are subject to removal by the Attorney General rather than by the President. *See* 28 U.S.C. § 542(b). Similarly, Special Attorneys are appointed by the Attorney General to assist the United States Attorneys and are removable by the Attorney General. *See* 28 U.S.C. § 543.

By requiring the certification of "the United States attorney," the certification requirement of § 3731 ensures that an accountable government

official reviews the merits of each government appeal to ensure that the appeal has not been filed simply to add delay before the courts dismiss charges against a defendant. *See United States v. Herman*, 544 F.2d 791, 794 n.4 (5th Cir. 1977). An individual line prosecutor who has lost a motion to suppress may abuse the power of the United States to bring an interlocutory appeal. The certification requirement imposes a procedural hurdle of outside review, ensuring that "the considered, objective judgment of a senior DOJ official" guides the Government's decision to appeal. *United States v. Weyhrauch*, 544 F.3d 969, 974 (9th Cir. 2008).

The potential remedy for a § 3731 violation is dismissal of the appeal. If the Government fails to file the appropriate certification, the Court of Appeals can dismiss the appeal at its discretion. *See, e.g., United States v. Hanks*, 24 F.3d 1235, 1239 (10th Cir. 1994) (dismissing a government appeal based on § 3731 violation); *United States v. Carillo-Bernal*, 58 F.3d 1490, 1497 (10th Cir. 1995) (same); *United States v. Vega*, 58 Fed. Appx. 815 (10th Cir. 2002) (same).

(b) The Ninth Circuit's View: The United States Attorney Must Personally Certify the Appeal. The Ninth Circuit has ruled that § 3731 imposes a "strict statutory requirement of personal certification by the United States Attorney." *Weyhrauch*, 544 F.3d at 974. *See also United States v. W.R. Grace*, 526 F.3d 499, 506 (9th Cir. 2008) (en banc) (requiring "certification by a United States Attorney (personally, not by an

Assistant United States Attorney)" to permit an appeal pursuant to § 3731).

Under the Ninth Circuit's standard, the law permits a delegation of the United States Attorney's power to an Assistant United States Attorney only when the Assistant has been appointed the Acting United States Attorney for that district. For example, in *United States v. Wallace*, 213 F.3d 1216 (9th Cir. 2000), the § 3731 certification was filed by the First Assistant United States Attorney for the district instead of the United States Attorney. The United States Attorney was out of the office and had formally delegated his power to the First Assistant pursuant to 28 C.F.R. § 0.131. Under that regulation, an United States Attorney who is absent from the office or recused from a matter can delegate his authority to an Assistant U.S. Attorney who becomes the Acting United States Attorney.[1] The Ninth Circuit held that because the First Assistant had become the Acting United States Attorney, he had the power to certify the appeal under § 3731. *See id.* at 1218-19

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[1] The regulation provides:

> Each U.S. Attorney is authorized to designate any Assistant U.S. Attorney in his office to perform the functions and duties of the U.S. Attorney during his absence from office, or with respect to any matter from which he has recused himself, and to sign all necessary documents and papers, including indictments, as Acting U.S. Attorney while performing such functions and duties.

28 C.F.R. § 0.131.

(recognizing the delegated authority, and noting that the letter formally delegating the power to the First Assistant United States Attorney should have accompanied the § 3731 certification to establish the First Assistant's "authority to sign" the certification).

The Ninth Circuit standard can require a careful inquiry to ensure that a properly-appointed United States Attorney has made the certification. For example, in *United States v. Gantt*, 194 F.3d 987 (9th Cir. 1999), the defendant argued that the § 3731 certification filed by the United States Attorney was inadequate because the United States Attorney had not been validly appointed. The United States Attorney had been appointed pursuant to 28 U.S.C. § 546(d), which permits the district court judges in a district to appoint a temporary United States Attorney before a vacancy is filled. Gantt argued that 546(d) violated the Appointments Clause, U.S. Const., Art. II, § 2, cl. 2, such that the United States Attorney was not properly appointed and lacked the power to file the § 3731 certification. The Ninth Circuit concluded that Gantt's argument required the court to reach the merits of Gantt's constitutional challenge because "[a]n infirmity in the United States Attorney's appointment would . . . nullify the § 3731 certification because, unlike many other rules, § 3731 specifically requires certification by the United States Attorney." *Id.* at 998.

The Ninth Circuit's approach is also demonstrated by the remarkable back-and-forth between the Ninth Circuit and the Justice Department in

United States v. Weyhrauch, 544 F.3d 969 (9th Cir. 2008). In that case, the Ninth Circuit refused to permit an appeal absent evidence that the individual who had signed the § 3731 certification had formally been delegated the power of a United States Attorney. The initial § 3731 certification was made by the Justice Department Trial Attorney who was the line prosecutor in the case. Before oral argument, the Ninth Circuit entered an order to show cause why the appeal should not be dismissed as improperly certified. *See id.* at 971. The Government responded by filing a new § 3731 certification by the Chief of the Public Integrity Section of the Criminal Division of the United States Department of Justice. The Ninth Circuit replied with a second order to show cause requiring the Government to explain why the Chief of the Public Integrity Section had the power to act as the United States Attorney. *See id.* at 971-72. The United States responded with a letter from the Executive Office for United States Attorneys explaining that the U.S. Attorney had been recused in the case, and that the Public Integrity Section had taken over the prosecution.

The Ninth Circuit refused to permit the appeal. *See Weyhrauch*, 544 F.3d at 972. The United States had not established that the United States Attorney himself or a person with "legitimate, delegated authority that is sufficiently documented" had filed the certification. *Id.* at 972. The Trial Attorney had filed the first certification at the direction of a United States Attorney, but that was insufficient. *Id.* at 973.

Further, the United States had failed to provide documentation that the Chief of the Public Integrity section had been formally delegated the power of Acting United States Attorney. *Id.*

The Ninth Circuit recognized that someone must have taken over as Acting United States Attorney, and it acknowledged that it was "logical to assume that the person in charge of whatever office takes over the investigation would be acting United States Attorney." *Id.* Nonetheless, the Government's procedure was insufficient: "The government's submission nonetheless fail[ed] to explain the mechanism, process or statutory authority" by which the Chief of the Public Integrity Section had been appointed the Acting United States Attorney. *Id.*

The Ninth Circuit relented only when Attorney General Michael Mukasey himself subsequently filed a third § 3731 certification. *See United States v. Weyhrauch*, 548 F.3d 1237, 1241 (9th Cir. 2008). The Ninth Circuit reasoned that the Attorney General had the power to designate an Acting U.S. Attorney pursuant to 28 U.S.C. § 515(a),[2] and that an

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[2] 28 U.S.C. § 515(a) states:

> The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrate judges, which United States attorneys are authorized by law to conduct,

(Continued on following page)

appointed Acting U.S. Attorney could file a § 3731 certification. The Attorney General's statutory authority to appoint someone who could file the certification therefore implied that "the Attorney General can certify an appeal under § 3731 if no one else has been properly designated to do so." *Id.* at 1242.

(c) The Sixth Circuit's View: Certification By An Assistant U.S. Attorney Satisfies the Statute. The decision below contrasts sharply with the views of the Ninth Circuit. In the decision below, the § 3731 certification was filed by the Assistant United States Attorney who was the lead prosecutor before the District Court and also a witness at the suppression hearing. App. 27. The United States has never contended or offered any evidence that the Assistant United States Attorney was appointed the Acting United States Attorney. Nonetheless, the decision below ruled that certification from the Assistant United States Attorney, Kevin Whitmore, satisfied § 3731. App. 25-26, n.11. ("As to defendant's contention that certification signed by an AUSA such as Whitmore – as opposed to the United States Attorney – cannot satisfy § 3731, we reject such a requirement. . . .").

The Sixth Circuit reasoned that the Justice Department policy requiring the Solicitor General to approve appeals satisfied the policy concerns

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whether or not he is a resident of the district in which the proceeding is brought.

motivating the statute. App. 26 n.11. Although the Sixth Circuit did not cite the authority for this policy, it appears to have in mind § 2-2.121 of *The United States Attorney's Manual*, which states:

> All appeals to the lower appellate courts in cases handled by divisions of the Department and United States Attorneys, and all petitions for certiorari and direct appeals to the Supreme Court must be authorized by the Solicitor General. This includes interlocutory appeals and appeals to state appellate courts.[3]

The Sixth Circuit also noted that the statute includes a rule of construction: The statute is to be liberally construed to effectuate its purposes. App. 26 n.11 (citing 18 U.S.C. § 3731). In the view of the Sixth Circuit, the DOJ policy combined with the canon of liberal construction were enough to trump the plain meaning of the statute. Although the statute requires the certification of the "United States attorney," the signature of an Assistant United States Attorney was sufficient. App. 26 n.11.

(d) The Eighth Circuit's View: Certification By An Assistant U.S. Attorney Satisfies the Statute. The Eighth Circuit has agreed with the Sixth Circuit's view. In *United States v. Wolk*, 466 F.2d 1143 (8th Cir. 1972), the § 3731 certification was filed by

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[3] http://www.justice.gov/usao/eousa/foia_reading_room/usam/title2/2mapp.htm#2-2.121

an Assistant United States Attorney. The Eighth Circuit ruled that this satisfied the statute:

> While the statute refers to the "United States attorney" the appellee cites no cases nor suggests any compelling reasons which justify a decision that would so needlessly circumscribe the ability of the United States Attorney to delegate responsibility. We recognize that the statute is to be "liberally construed to effectuate its purposes", 18 U.S.C. § 3731, and, we can unearth no reason to disregard that direction in this case.

Id. at 1146 n.2.

Similarly, in *United States v. Kleve*, 465 F.2d 187 (8th Cir. 1972), the United States tried to comply with § 3731 by way of an affidavit by an Assistant United States Attorney. The affiant stated that he was an Assistant United States Attorney "acting on behalf of the United States Attorney," and the affidavit contained the text of the required certification. *Id.* at 189. The Eighth Circuit ruled that the certification satisfied the statute even though it was only made by an Assistant United States Attorney. *See id.* at 190 (concluding that the "[d]efendants' contention that the Assistant United States Attorney in charge of the prosecution cannot be delegated authority by the United States Attorney to file the certificate lacks merit.").

(e) A Conflict Exists Among the Circuits. The conflict exists between the Sixth Circuit and Eighth Circuit on one hand and the Ninth Circuit on the

other. In the Sixth Circuit and the Eighth Circuit, the § 3731 certification can be filed by any Assistant United States Attorney. *See* App. 25-26 n.11; *Wolk*, 466 F.2d at 1146 n.2. In the Ninth Circuit, by contrast, the certification must be filed by the United States Attorney, an appointed Acting United States Attorney, or the Attorney General of the United States. *See United States v. Weyhrauch*, 548 F.3d 1237, 1241 (9th Cir. 2008); *United States v. Gantt*, 194 F.3d 987, 998 (9th Cir. 1999). If the certification is filed by someone other than the United States Attorney, documentation establishing that person's authority to act as the United States Attorney must be filed along with the certification. *See United States v. Wallace*, 213 F.3d 1216, 1219 (9th Cir. 2000); *United States v. Dierking*, 359 Fed. Appx. 823 (9th Cir. 2009).

The disagreement among the circuits is implicated by this case. As the *Weyhrauch* litigation shows, the Ninth Circuit will not let a government appeal proceed unless a certification is filed by a person with proper authority. *Weyhrauch*, 548 F.3d at 1241; *Weyhrauch*, 544 F.3d at 974. In contrast, the Sixth Circuit held that the signature by a mere Assistant United States Attorney satisfied the statute and moved on to the merits of the appeal. App. 25-26 n.11. The certification in this case was not only made by a prosecutor, it was made by a witness at the suppression hearing whose testimony was the subject of the Government's appeal. Assistant United States Attorney Whitmore called himself at the suppression hearing; then stepped back into the role of advocate

and argued that he was a credible witness; then filed the § 3731 certification after the District Court rejected his testimony; and then briefed the appeal before the Sixth Circuit in which he argued that the District Court was clearly erroneous when it rejected his testimony. App. 27 (Kethledge, J., concurring) (noting that "[o]ne of the many remarkable aspects of this case" was that the same government lawyer who "called himself as a witness in the district court" then "proceeded to write and sign" the Government's appellate brief). The Ninth Circuit would not have permitted such a case to proceed. *Weyhrauch*, 548 F.3d at 1241.

II. CERTIORARI REVIEW IS JUSTIFIED BECAUSE LOWER COURTS HAVE IGNORED THE WARNINGS OF THE COURTS OF APPEALS TO COMPLY WITH 18 U.S.C. § 3731.

Certiorari review is also justified because lower courts have ignored the frequent warnings by the Courts of Appeals as to the importance of 18 U.S.C. § 3731. A decade ago, one Court of Appeals panel lamented that "[u]nfortunately, some government attorneys from time to time treat the § 3731 certification requirement as a mere formality and even neglect to file the certification in a timely manner." *United States v. Gantt*, 194 F.3d 987, 997 (9th Cir. 1999) (citing cases). Since then, however, the Courts of Appeals have expressed increasing dismay at the Justice Department's failure to take seriously the requirements of § 3731.

For example, in *United States v. McNeil*, 484 F.3d 301 (4th Cir. 2007), Judge Niemeyer characterized the Government's repeated failure to comply with § 3731 in previous cases as "shameful lapses in professionalism." *Id.* at 310. The "unfortunate fact" was that even after "repeated warnings" by the Fourth Circuit in published opinions, the Department of Justice "continued to neglect the statutory requirements as we construed them." *Id.*

Similarly, in *United States v. Weyhrauch*, 548 F.3d 1237 (9th Cir. 2008), the Ninth Circuit expressed significant frustration at the Justice Department's refusal or inability to comply with § 3731: "Apparently," the Ninth Circuit wrote, "our hortatory language and square holdings have not convinced the government that the statutory requirements for § 3731 certification are requirements rather than suggestions." *Id.* at 1243. The Ninth Circuit warned: "We shall not be so forgiving in the future." *Id.*

The evident frustration among the Courts of Appeals mirrors the uncertainty as to the requirements of the statute. Legal uncertainty as to what § 3731 requires has rendered the statute something of an afterthought. In the Ninth Circuit, the requirements of § 3731 are strict. In the Eighth Circuit and (now) the Sixth Circuit, however, the certification requirement is merely a boilerplate sentence filed by a prosecutor together with the Notice of Appeal. Supreme Court review is needed to resolve the uncertainty and resolve whether § 3731 is the serious

procedural requirement that some circuits assert or is the boilerplate that is permitted in other circuits.

III. THE SIXTH CIRCUIT'S INTERPRETATION OF THE STATUTE IS INCORRECT.

The third reason the Court should grant certiorari is that the decision below is incorrect. The text of the statute is clear: It requires certification by "the United States attorney." 18 U.S.C. § 3731. This is the exact phrase, with the exact capitalization, that Congress used when it created the position of United States Attorney. *See* 28 U.S.C. § 541(a) ("The President shall appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district."). Congress has used this exact phrase consistently throughout the United States Code. When it wishes to refer to United States Attorneys specifically, it has done so. *See, e.g.*, 28 U.S.C. § 546 ("The Attorney General may determine the official stations of United States attorneys and assistant United States attorneys within the districts for which they are appointed.").

In contrast, Congress consistently uses a different term-of-art, "attorney for the government," when it wishes to bestow an authority on all federal prosecutors. The phrase "attorney for the government" is specifically defined in the Federal Rules of Criminal Procedure. *See* Fed. R. Crim. Pro. 1(b)(1) (defining "Attorney for the government" as "the Attorney General or an authorized assistant," "a United States

attorney or an authorized assistant," "any other attorney authorized by law to conduct proceedings under these rules as a prosecutor," and some other attorneys for cases arising under the law of Guam). Congress has routinely used this phrase when it wishes to give a power to any federal prosecutor. *See, e.g.*, Fed. R. Crim. Pro. 41(b) (permitting the issuance of a search warrant based on the application of "an attorney for the government"); 18 U.S.C. § 3123(a) (permitting the issuance of a pen register order based on the certification by an "attorney for the Government"); 18 U.S.C. § 3145 (permitting "the attorney for the Government" to file a motion to revoke a release order).

The decision below effectively rewrites the statute Congress wrote, replacing "United States attorney" with "attorney for the Government." Further, the decision below justifies that decision based on the internal policies of the Executive Branch that Congress was expressly trying to regulate by enacting the certification requirement of § 3731. In effect, the Justice Department's current policy is treated as a replacement for the plain textual prohibition that Congress enacted. App. 26, n.11. But Congress wrote what Congress wrote. It is not up to judges to replace the requirement that Congress imposed with a different requirement that judges deem more appropriate.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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604 F.3d 230

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* *v.* RANDE H. LAZAR, *Defendant-Appellee.*	No. 08-5653

Appeal from the United States District Court for the Western District of Tennessee at Memphis. No. 04-20017 Bernice B. Donald, District Judge.

Argued: December 4, 2009

Decided and Filed: May 4, 2010

Before: GRIFFIN and KETHLEDGE, Circuit Judges; CARR, Chief District Judge.*

COUNSEL

ARGUED: Stephen C. Parker, ASSISTANT UNITED STATES ATTORNEY, Memphis, Tennessee, for Appellant. Orin S. Kerr, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, Washington, D.C., for Appellee.

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* The Honorable James G. Carr, Chief United States District Judge for the Northern District of Ohio, sitting by designation.

ON BRIEF: Stephen C. Parker, Kevin Whitmore, ASSISTANT UNITED STATES ATTORNEYS, Memphis, Tennessee, for Appellant. Orin S. Kerr, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, Washington, D.C., Steven E. Farese, Sr., FARESE, FARESE & FARESE, P.A., Ashland, Mississippi, Marc N. Garber, THE GARBER LAW FIRM, P.C., Marietta, Georgia, Daniel A. Clancy, CLANCY LAW FIRM, Jackson, Tennessee, for Appellee.

CARR, D.J., delivered the opinion of the court, in which GRIFFIN, J., joined. KETHLEDGE, J. (p. 18), delivered a separate concurring opinion.

OPINION

JAMES G. CARR, District Judge. This is an appeal from an order granting the defendant's motion to suppress evidence seized from two medical offices. Following the searches, a grand jury indicted the defendant, Dr. Rande H. Lazar, a pediatric otolaryngologist, on 110 counts of health care fraud. A superceding indictment charges him with devising and executing a scheme to defraud and obtain money from health care benefit programs.

The defendant contended in the District Court and argues in this Court: 1) the affidavit for the warrant did not establish probable cause; 2) the warrant did not meet the particularization requirement of the Fourth Amendment; 3) the government's

claim of inevitable discovery has no merit; and 4) suppression is therefore appropriate.

The District Judge, agreeing with the defendant and adopting the Report and Recommendation of a United States Magistrate Judge [the reviewing Magistrate Judge], granted the defendant's motion to suppress, ordering exclusion of all evidence seized in the challenged searches.

For the following reasons, we affirm the decision of the District Court in part, and vacate in part.

Standard of Review

This Court reviews a district court's ruling on a motion to suppress for clear error on factual determinations, and *de novo* on legal determinations. *United States v. Adams,* 583 F.3d 457, 463 (6th Cir. 2009). "A factual finding will only be clearly erroneous when, although there may be evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* (internal quotation and citation omitted). This Court reviews the evidence "in the light most likely to support the district court's decision." *Id.* (internal quotation and citation omitted). Legal determinations reviewed *de novo* include determinations regarding the existence, or lack thereof, of probable cause. *United States v. Leake,* 998 F.2d 1359, 1362 (6th Cir. 1993).

Background

A Magistrate Judge [the issuing Magistrate Judge] signed the warrants at issue on October 9, 2002, for searches of offices located at 777 Washington Avenue and 791 Estate Place, Memphis, Tennessee. The applications, affidavits and warrants were duplicates, except with regard to the addresses to be searched. The affiant was Tennessee Bureau of Investigation Special Agent/Criminal Investigator Donald F. Lee. Assistant United States Attorney [AUSA] Kevin Whitmore was with Agent Lee when Agent Lee presented the applications and affidavits to the issuing Magistrate Judge.

When submitted, the warrant applications included – as part of the affidavit – Attachment A, describing the premises to be searched, and Attachment B, captioned "Description of the Items to be Seized." Attachment B listed the items subject to seizure in eight paragraphs, stating, in summary:

1. "Any and all documents and records . . . including but not limited to patient charts, files, medical records . . . concerning the treatment of any of the below listed patients, claim forms, billing statements, records of payments received . . . for the following patients:";

2. "Any and all information and data, pertaining to the billing of services. . . .";

3. "Any and all computer hardware. . . .";

4. "Any and all computer software. . . .";

5. "Any computer related documentation. . . .";

6. "Any computer passwords. . . .";

7. "If a determination is made during the search, by the Special Agent assigned to the computer aspect of this search, . . . that imaging or recreation of the computer hard drives will damage the seized information, you are authorized to seize the computers. . . ."; and

8. "All other records or property that constitutes evidence of the commission of the offenses outlined in the search warrant". . . .

In addition to the warrant applications, the supporting affidavits, Attachments A and B, and the warrants themselves, the "packet" submitted for the issuing Magistrate Judge's review included a list of patient names. [5/26/2005 Suppression Hearing Tr. 145] [Hearing Tr.].

According to the reviewing Magistrate Judge's Report and Recommendation advising suppression:

> AUSA Whitmore testified [at the suppression hearing] that he was present when the affidavits and applications, attachments A and B, and the warrants were presented to [the issuing Magistrate Judge]. Whitmore told the court [at the suppression hearing] that he created a list of names of specific patients for whom records were to be seized and gave the list to Agent Lee, who in turn

> presented it to the magistrate judge. Whitmore claimed [at the suppression hearing] that he and [the issuing Magistrate Judge] had a discussion concerning the patient list before the warrants were signed. The substance of this conversation is unknown; however, there was some indication by Whitmore that he discussed with [the issuing Magistrate Judge] the idea of not attaching the patient list to the affidavits and applications and the warrants out of concern that the names of minor children would be made public. In addition, Whitmore testified that at the time that Agent Lee was under oath, the patient list was a part of the search warrant package presented to the magistrate.

[Dist. Ct. Doc. 342, at 6-7].[1]

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[1] The substance of the conversation between the issuing Magistrate Judge, AUSA Whitmore and Agent Lee is unknown for three reasons: 1) the issuing Magistrate Judge did not record the proceedings; 2) the reviewing Magistrate Judge sustained the defendant's objection to testimony by Whitmore at the suppression hearing about his conversation with the issuing Magistrate Judge about the patient list; and 3) the reviewing Magistrate Judge also refused the government's request to call the issuing Magistrate Judge. [Hearing Tr. 139-45, 169-70].

The reviewing Magistrate Judge refused to permit Whitmore to testify because she perceived his testimony about patient files to be offered as "oral supplementation" [*Id.* at 145] that she would not consider "in determining whether there was probable cause to issue the warrant." [*Id.* at 143]. This was so because Whitmore was not under oath when before the issuing

(Continued on following page)

Magistrate Judge, and "any oral supplementation would have to be under oath or affirmation." [*Id.* at 145].

The reviewing Magistrate Judge also declined to permit the government to call the issuing Magistrate Judge, because she perceived that he would be asked about "matters he considered" in issuing the warrants. [*Id.* at 170].

This exclusion of "the discussion about the patient files" was erroneous. That testimony likely would have explained why the patient list was not attached to the warrants when issued: "[T]here was a discussion as relates to the concerns of the privacy issue concerning these children, that if it were to remain a part of the public record that it would be put in the public domain. And it was at that point there was a discussion whereby it was not part of the permanent record." [*Id.* at 164].

His testimony thus likely would not have related to the issue of probable cause for the warrant, but to the administrative matter of why the patient list was not attached to the warrants. Rule 41 of the Federal Rules of Criminal Procedure does not require an individual to take a preliminary oath before describing what happened after a warrant issued. There was no basis, therefore, for the reviewing Magistrate Judge to exclude evidence about why the patient lists became detached from the warrants when the lists were in front of the issuing Magistrate Judge at the time he issued the warrants.

Despite the error in excluding testimony at the suppression hearing about the conversation between the issuing Magistrate Judge, Whitmore and Agent Lee, reversal on that basis is improper for three reasons. First, Whitmore failed to point out to the reviewing Magistrate Judge that he was not offering his own testimony to supplement the probable cause showing, but rather to show what happened to the patient list after the warrants issued. Second, Whitmore did not point out that the issuing Magistrate Judge's testimony would not have related to the Magistrate Judge's thought processes, but simply to whether the warrant package included a patient list, and if so which list. Third, Whitmore failed to make a proffer of the contents of his or the issuing Magistrate Judge's testimony, except to indicate that it was about the patient lists.

The reviewing Magistrate Judge first noted that "there were no patient names listed after the colon in paragraph one of Attachment B," and that the applications, affidavits, and warrants, which incorporated the affidavits, did not include any patient-specific identifiers. [*Id.* at 7].

The reviewing Magistrate Judge's Report and Recommendation, however, made no finding as to which, if any, patient lists came before the issuing Magistrate Judge.[2] It instead focused on the absence

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[2] This is problematic due to the numerous patient lists in the record and our determination, see *infra*, that whichever patient list the issuing Magistrate Judge saw particularized the search warrants in part.

The parties submitted eight lists at the suppression hearing:

- Exhibit 6a was an alphabetical list of 125 patients (with patient file numbers written on it by the defendant's staff member on the date of the search), which Whitmore testified "was a list of patients that I developed from a – that I reduced to a letter-size for the purpose of presenting it to the agent and it would be presented to the judge, part of the search warrant application" [Hearing Tr. 147];
- Exhibit 6b, captioned "Lazar Search Warrant by Patient Name," was an alphabetical list of patients *different from those listed in Exhibit 6a*; and
- Exhibit 6c, captioned "Lazar Search Warrant by Date of Service," contained the same names as listed in Exhibit 6b, but sorted by dates of "service" (*i.e.*, treatment by the defendant).

(Continued on following page)

of any *original* patient lists at the suppression hearing:[3]

- Exhibit 8: an inventory of sixty-eight patient files seized during the search of 777 Washington Avenue [Hearing Tr. 66], thirty-one individuals from Exhibit 6a, thirty-six from Exhibits 6b and 6c, and one individual on none of the lists;
- Exhibit 10: a patient list – the one used during the search of 777 Washington Avenue according to Agent Geasley [*Id.* at 76] – of sixty-eight patient files consisting of the same individuals as Exhibits 6b and 6c;
- Exhibit 12: an inventory of, *inter alia,* sixty-nine patient files and sixty CATSCAN films seized during the search of 791 Estate Place [*Id.* at 116-18]; all of these files and films belong to patients listed in Exhibit 6a except for eight, four of which come from Exhibits 6b and 6c, and four of which are of individuals on none of the lists;
- Exhibit 13: an inventory list identical to Exhibit 12 but less detailed and more narrowly spaced; and
- Exhibit 15: a list of patient names – consisting of the same individuals as Exhibit 6a – attached as Attachment A to the government's response to the defendant's motion to suppress and represented by Whitmore to be the "working copy" of the patient list used. [Hearing Tr. 156-59].

[3] To the extent that the reviewing Magistrate Judge was concerned about the absence of the original list given to the issuing Magistrate Judge, her concerns were not well-founded. As noted in *United States v. Posey,* 501 F.2d 998, 1002 (6th Cir. 1974), a court may consider a duplicate (in that case, of a missing affidavit), even one that contains later-added material, when determining whether a search warrant lawfully issued.

> During the course of AUSA Whitmore's testimony [at the suppression hearing], it was discovered that there were several patient lists in existence. *See* Exh. 6a, 6b, 6c, 10, and 15. *None of the lists entered into evidence at the hearing were the actual list presented to the magistrate and none of them were identical.* In fact, AUSA Whitmore testified that he did not have copy of the original patient list that was presented to the magistrate judge. Whitmore referred to the patient list attached to the government's response to the present motion as a "working copy" and stated the attached copy was not the one presented to the magistrate judge. Nor are there any patient lists in the clerk's files [containing the search warrants].

[*Id.* at 7-8] (emphasis added).

The reviewing Magistrate Judge avoided determining which patient list came before the issuing Magistrate Judge because she believed it did not matter: "The fact that the [issuing] magistrate judge may have viewed a patient list before signing the warrants does not save the warrants from its [sic] facial invalidity." [*Id.* at 12].

The reviewing Magistrate Judge also found that the warrants lacked probable cause to believe that patients' medical records would be in the defendant's medical offices.

Reviewing the Report and Recommendation, the District Judge – without allowing argument or further

supplementation of the record[4] – adopted the reviewing Magistrate Judge's recommendation that the evidence be suppressed. [Dist. Ct. Doc. 506]. The District Judge made no further finding as to any patient list presented to the issuing Magistrate Judge.

Discussion

I. The Search Warrants Incorporated Any Patient List Presented to the Issuing Magistrate Judge

The reviewing Magistrate Judge held that the language of the first paragraph of Attachment B did not suffice to incorporate a patient list into the affidavit and warrants.

That conclusion, however, is incorrect. "Incorporation" of one thing into another need not be by express "reference." *Cf. Northrop Grumman Info. Tech., Inc. v. United States*, 535 F.3d 1339, 1346 (Fed. Cir. 2008) (no "magic words" needed to incorporate one document into another); *Resolution Trust Corp. v. Fed. Sav. and Loan Ins. Corp.*, 25 F.3d 1493, 1499 (10th Cir. 1994) ("Phrases such as 'incorporated by

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[4] The District Judge rejected the government's request that she conduct a further hearing and consider additional evidence. In light of the confusing nature of the various and conflicting pieces of evidence presented to the reviewing Magistrate Judge, it would have been preferable for the District Judge to have granted the parties a hearing at which to clarify and expand the record. Had such a hearing occurred, this appeal and our remand may not have been necessary.

reference' are not talismanic, without which we do not consider additional necessary documents that effectuate the parties' agreement.").

Here, the first paragraph of Attachment B gave sufficient direction when it referred to "the below listed patients" and "the following patients." Any patient list presented to the issuing Magistrate Judge thus was effectively incorporated into the search warrants. If the record otherwise shows that the government seized patient files according to the list, if any, presented to the issuing Magistrate Judge, a lack of formal incorporation by reference into the warrants does not justify a finding of facial insufficiency.

II. Suppression of Patient Records Seized Beyond the Scope of Whichever List Came Before the Issuing Magistrate Judge Is Required Under *Groh v. Ramirez*

The Supreme Court's decision in *Groh v. Ramirez,* 540 U.S. 551 (2004), rather than its more recent, but less on point, decision in *Herring v. United States,* ___ U.S. ___, 129 S. Ct. 695, 698 (2009), controls, and requires suppression of all patient records seized beyond the scope of any patient list presented to the issuing Magistrate Judge.

In *Groh,* a law enforcement officer prepared a search warrant and affidavit for a Magistrate Judge's approval. The search warrant "failed to identify any of the items that [the agent] intended to seize." 540

U.S. at 554. The warrant also failed to "incorporate by reference the itemized list contained in the application [affidavit]. It did, however, recite that the Magistrate was satisfied the affidavit established probable cause[.]" *Id.* at 554-55. The Magistrate Judge subsequently signed the defective warrant.

Discussing the constitutionality of the search, the Supreme Court observed: "Even though petitioner acted with restraint in conducting the search, 'the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer.'" *Id.* at 561 (quoting *Katz v. United States,* 389 U.S. 347, 356 (1967)).

The Court concluded that, "[b]ecause [the officer] did not have in his possession a warrant particularly describing the things he intended to seize, proceeding with the search was clearly unreasonable under the Fourth Amendment." *Id.* at 563. In so deciding, the Court stated:

> [U]nless the particular items described in the affidavit are also set forth in the warrant itself (or at least incorporated by reference, and the affidavit present at the search), there can be no written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit.

Id. at 560.

Quoting its prior decision in *United States v. Leon,* 468 U.S. 897, 923 (1984), the Supreme Court

further held that the good faith exception[5] did not apply: "'[A] warrant may be so facially deficient – *i.e.*, in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid.' This is such a case." *Groh*, 540 U.S. at 565.

The Supreme Court's recent decision in *Herring* does not question this statement of law.

In *Herring*, an individual sought to retrieve an item from his impounded truck. From a warrant check on the individual, an officer learned that a warrant for the individual's arrest was outstanding. Acting on that information, the officer arrested and searched the individual, finding drugs and an unlawfully possessed firearm.

There was, however, no outstanding warrant. The warrant about which the officer had been notified had, in fact, been withdrawn. Through a clerical error, the warrant had not been cleared from the system. Had the warrant been properly cleared, the officer would not have arrested or searched the individual.

The Court stated that, to require exclusion in such circumstances, the error by the police must be

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[5] The good faith exception to the exclusionary rule applies when "the officer conducting the search acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that subsequently is determined to be invalid." *Leon*, 468 U.S. at 922-23.

"reckless or deliberate." 129 S. Ct. at 700. This is because "the benefits of deterrence must outweigh the costs" to justify exclusion of evidence, and the possible deterrence of negligent action by law enforcement does not rise to a level sufficient to trigger exclusion of evidence. *Id.* The Court stressed that the question of suppression "turns on *the culpability of the police* and the potential of exclusion *to deter wrongful police conduct*." *Id.* at 698 (emphasis added); *see also United States v. Calandra*, 414 U.S. 338, 348 (1974) (explaining that the exclusionary rule is "designed to safeguard Fourth Amendment rights generally through its *deterrent* effect" (emphasis added)).

This case does not involve the sort of police error or misconduct present in *Herring*. Like *Groh*, it instead deals with particularization of search warrants and whether they are facially deficient. Despite the government's argument to the contrary,[6] *Herring* does not purport to alter that aspect of the exclusionary rule which applies to warrants that are facially deficient warrants *ab initio*.[7]

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[6] *See* 11/24/2009 Government's Letter to this Court Regarding Supplemental Citations ("The United States submits the Supreme Court's decision in *Herring v. United States*, ___ U.S. ___, 129 S.Ct. 695, 699-700, 172 L.Ed.2d 496 (2009), greatly expanded the Good Faith Expansion [sic] and has changed the applicable standard in determining if the Good Faith exception applies if an [sic] search warrant lacks particularity.").

[7] The government points to the Tenth Circuit's decision in *United States v. Otero*, 563 F.3d 1127 (10th Cir. 2009), to support its argument. That decision, however, does not do so. 563 F.3d at

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Here, the warrant was particularized insofar as it described – and thus allowed seizure of – patient records based on any patient list that came before the issuing Magistrate Judge. Suppression of patient files seized pursuant to any such list was therefore erroneous, and reversal of that decision is appropriate. *See United States v. Johnson,* 351 F.3d 254, 260 (6th Cir. 2003) ("[I]nfirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant . . . , but does not require the suppression of anything described in the valid portions of the warrant[.]" (internal quotation and citation omitted)).

As regards records of patients whose names did not appear on a patient list presented to the issuing Magistrate Judge, the facts of this case mirror those in *Groh* and require suppression of those files. This

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1134 (citing *Leon* and applying the "pre-*Herring* precedent hold[ing] that a warrant may be so facially deficient . . . that the executing officers cannot reasonably presume it to be valid" (internal quotation omitted)); *see also United States v. Potts,* 586 F.3d 823, 832-33 (10th Cir. 2009) (quoting *Otero* and *Leon*).

At oral argument, the government asserted that the Ninth Circuit's decision in *United States v. SDI Future Health, Inc.,* 553 F.3d 1246 (9th Cir.), *superseded by* 568 F.3d 684 (9th Cir. 2009), justifies reversal on the particularization issue. Timeliness of the government's argument aside, *SDI Future Health* does not persuade us that the District Court was in error. 568 F.3d at 706 (applying a *Leon* objective reasonableness analysis, as well as unique Ninth Circuit precedent, and finding a warrant in a health care fraud investigation to fail particularization, irrespective of the presence of an allegedly curing affidavit).

facial deficiency was so evident, moreover, that no officer could reasonably presume the warrants valid.

Because the District Court did not make a finding as to which patient list came before the issuing Magistrate Judge, however, we cannot yet determine exactly which patient records should have been suppressed.

We therefore vacate the District Court's suppression of defendant's patient files with instructions for the District Court to determine which list – if any – came before the issuing Magistrate Judge, and to suppress only patient files seized beyond the scope of such list.

III. Suppression of the Non-Patient File Evidence is Proper

The reviewing Magistrate Judge also recommended that all non-patient file evidence be suppressed, and the District Court did so.

We have held that "[f]ailure to limit broad descriptive terms by relevant dates, when such dates are available to the police, will render a warrant overbroad." *United States v. Ford,* 184 F.3d 566, 576 (6th Cir. 1999).

Here, the reviewing Magistrate Judge reasoned: "Rather than specify exactly which documents it was seeking, the government chose to use descriptions of items to be seized that referenced no specific patients, no specific transactions, and most importantly, no

time frame." We agree with the District Court's decision in this regard.

We therefore affirm the District Court's suppression of the non-patient file evidence.[8]

IV. The Inevitable Discovery Doctrine is Inapplicable

The government argues in the alternative that the inevitable discovery doctrine prevents suppression of the evidence.

The doctrine of inevitable discovery allows admission of unlawfully obtained evidence if the government can "establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *Nix v. Williams*, 467 U.S. 431, 444 (1984). To establish inevitable discovery, the government must show that the evidence would have been acquired lawfully through an independent source absent the government misconduct. *Id.* at 448.

The government claims that it would have obtained the files suppressed by the District Court through use of a Department of Justice or grand jury subpoena. It points out that it had already used a

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[8] This includes the "Attorney Information" files, a file containing Medicare/Medicaid claims for six years, three backup tapes containing billing information, and the mirror-image of a computer hard drive.

subpoena to inspect some of the defendant's records. It asserts that it resorted to search warrants to diminish the risk that, if it subpoenaed the files, the defendant might either decline to produce or alter the subpoenaed files.

Complications can readily arise from use of a subpoena. As the Second Circuit stated in *United States v. Roberts,* 852 F.2d 671, 676 (2d Cir. 1988):

> The mere fact that the government serves a subpoena, however, does not mean that it will obtain the documents it requests. A subpoena can be invalid for a variety of reasons, as when it is unduly burdensome, when it violates the right against self-incrimination, or when it calls for privileged documents. Moreover, we can deplore but not ignore the possibility that the recipient of a subpoena may falsely claim to have lost or destroyed the documents called for, or may even deliberately conceal or destroy them after service of the subpoena.

Accord Ctr. Art Galleries – Hawaii, Inc. v. United States, 875 F.2d 747, 754-55 (9th Cir. 1989) (following Roberts).[9]

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[9] Even where challenges on the basis of breadth, burdensomeness or privilege are not successful, they are commonplace and result, at best, in delay and uncertainty. Oftentimes, delay, not discovery, is an inevitable consequence of serving a subpoena.

The government, citing *United States v. Keszthelyi,* 308 F.3d 557 (6th Cir. 2002), *United States v. Ford,* 184 F.3d 566 (6th Cir. 1999), and *United States v. Stamper,* 91 F. App'x 445 (6th Cir. 2004) (unpublished disposition),[10] contends that the Sixth Circuit takes a different, and less demanding, approach to the inevitable discovery exception.

This Court has held that "the inevitable discovery exception to the exclusionary rule applies when the government can demonstrate either the existence of an independent, untainted investigation that inevitably would have uncovered the same evidence or *other compelling facts* establishing that the disputed evidence inevitably would have been discovered." *United States v. Kennedy,* 61 F.3d 494, 499 (6th Cir. 1995) (emphasis added).

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[10] *Stamper* does not, as the government contends, endorse the use of a subpoena as a way around the consequences of unconstitutional conduct. The issue of inevitable discovery in that case involved learning the identity of a witness found in a motel room which officers had entered unlawfully to arrest the defendant. The court held that the officers would have learned the witness's identity from motel registration regardless of the unlawful entry, and that they then could have procured her testimony by subpoena. 91 F. App'x at 459. What was to be discovered inevitably was a record, made by and located in the hands of a third party. Even if the officers had not entered the room, the record would have led them to the witness. The ensuing evidence – the witness's testimony – would have come from the witness, rather than the defendant. The defendant in *Stamper,* in contrast to the defendant here, thus controlled none of the sources of information or evidence on which the government in that case based its claim of inevitable discovery.

In *Ford,* this Court stated: "The government can satisfy its burden by showing that routine procedures that police would have used regardless of the illegal search would have resulted in the discovery of the disputed evidence." 184 F.3d at 577. Though some speculation as to how events would have unfolded, absent an illegal search, may be necessary, "we must keep speculation at a minimum by focusing on *demonstrated historical facts* capable of ready verification or impeachment." *Id.* (quotation omitted) (emphasis added); *see also Keszthelyi,* 308 F.3d at 574.

A court assesses the likelihood that "routine procedures" would have led inevitably to acquisition of the evidence as of the time of the unlawful search. *United States v. Alexander,* 540 F.3d 494, 502 (6th Cir. 2008) (holding that a court is "to determine, viewing affairs as they existed at the instant before the unlawful search, what would have happened had the unlawful search never occurred").

The record in this case shows that the government had used third party subpoenas during its investigation before seeking the warrants, and the government represented that it had reason to believe that if it continued to do so, at least regarding Dr. Lazar's records, he would likely attempt to alter those records. [Dist. Ct. Doc. 153, at 17]. That concern appears to have prompted the government to get the search warrants.

The record does not show that the government, at the time it obtained the warrants, concurrently

contemplated issuing subpoenas for any records in Dr. Lazar's possession. The government's brief talks a good bit about how common subpoenas are in health care fraud and other white collar investigations. The government, however, presents no *evidence* establishing that it likely would have sought to acquire Dr. Lazar's records by subpoena, much less procured them in the same condition and as promptly as by seizing them with a warrant.

Even if the government need not show that it would likely have obtained the records as quickly and completely with a subpoena, it must at least show that it was ready to obtain them in that manner if, for any reason, it could not have done so – or would have chosen not to do so – with a search warrant. *See Roberts,* 852 F.2d at 676.

As the Second Circuit stated in *United States v. Eng,* 971 F.2d 854, 860-61 (2d Cir. 1992):

> In view of the need to prevent the inevitable discovery exception from swallowing the exclusionary rule, special care is required on the part of a district court when the government relies on the subpoena power. While we decline to draw a bright line, it is essential that there be a substantial degree of directness in the government's chain of discovery argument, rather than a hypothesized "leapfrogging" from one subpoena recipient to the next until the piece of evidence is reached. Further, the government must show that both issuance of the subpoena, and a

> response to the subpoena producing the evidence in question, were inevitable. Particular care is appropriate where, as here, subpoenas are issued after or at the time of the unlawful search, an issue that *Roberts* did not present. We share the Ninth Circuit's view that subpoenas must not serve as an after the fact "insurance policy" to "validate" an unlawful search under the inevitable discovery doctrine. *See Center Art Galleries*, 875 F.2d at 755.

Most simply put, here, as in *Ford,* "the record does not substantiate the government's claim that it was hot on the trail of the disputed evidence. The government has not carried its burden of proving the inevitability of discovery." 184 F.3d at 578.

The government asks us, in effect, to find that discovery – *i.e.,* acquisition – of the suppressed evidence was inevitable simply because the law allows subpoenas to issue. Were we, or any court, to accept this contention, the mere possibility that a subpoena could or might issue would always trump suppression.

We conclude, accordingly, that the government did not meet its burden of showing that, despite the partial invalidity of the warrants, retrieval of the unconstitutionally seized set of patient files and records was inevitable, whether by means of a subpoena or otherwise.

V. Probable Cause Supported the Warrants

The District Court found, and the defendant argues, that the warrants lacked probable cause to believe that the patients' medical records would be found in the defendant's medical offices.

We reverse the District Court's finding on this issue.

In making a probable cause determination, an issuing Magistrate Judge's task is "simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). A court reviewing an issuing Magistrate Judge's determination, moreover, is to pay "great deference" to the Magistrate Judge's finding of probable cause, and should uphold a warrant so long as the Magistrate Judge had a "substantial basis for . . . concluding that a search would uncover evidence of wrongdoing." *Leake*, 998 F.2d at 1363 (internal quotations and citations omitted).

In *United States v. Word*, this Court held that where individuals are patients of a physician, "probable cause exist[s] for believing that their medical records would be located at the [physician]'s office." 806 F.2d 658, 662 (6th Cir. 1986).

In light of *Gates*, *Leake* and *Word*, here Agent Lee's affidavit in the warrant applications provided a foundation for a common sense determination that there was a fair probability that evidence of health care fraud – namely, the defendant's patient files and records - would be found at the defendant treating physician's offices.

This foundation stemmed from the connection Agent Lee drew between the defendant and the offices in question. Agent Lee based his affidavit on his personal, two-year involvement in the case; the basis for his conclusion included his: 1) personal visits to each location and photographs thereof at Attachment A of each warrant; 2) review of the defendant's billing data and hospital records; and 3) interviews of the defendant's former office administrator, the defendant's former medical partners, and insurance company representatives.

We accordingly hold that Agent Lee's affidavit and photographs provided the issuing Magistrate Judge with a substantial basis to find probable cause to believe that the patient files and records would be found at the defendant's offices at the locations specified. The District Court's determination to the contrary was in error.[11]

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[11] Defendant argues also that the government violated 18 U.S.C. § 3731, which requires that the "United States Attorney certif[y] to the district court that the appeal is not taken for purpose of delay and that the evidence [suppressed] is a substantial

(Continued on following page)

Conclusion

For the foregoing reasons, we **AFFIRM** in part and **VACATE** in part the District Court's decision to suppress the evidence seized from the defendant's offices, and **REMAND** to the District Court for proceedings consistent with this opinion.

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proof of a fact material in the proceeding." Defendant alleges that this violation occurred when Whitmore – an AUSA and witness in the case below – signed the government's certification to appeal this case, thus circumventing the statute's intended "conscientious pre-appeal analysis." *United States v. Smith*, 263 F.3d 571, 577 (6th Cir. 2001) (internal quotation and citation omitted).

Defendant's argument is not well taken. As the government points out, United States Attorney's Offices must obtain permission to appeal adverse rulings to the U.S. Courts of Appeals: The Criminal Division of the Department of Justice reviews the case and prepares a memorandum for the Solicitor General of the United States, who makes the final decision on whether to appeal.

As to defendant's contention that certification signed by an AUSA such as Whitmore – as opposed to the United States Attorney – cannot satisfy § 3731, we reject such a requirement, especially in light of the review process outlined above. *Accord United States v. Smith*, 532 F.2d 158, 160 (10th Cir. 1976); *United States v. Wolk*, 466 F.2d 1143, 1146 n.2 (8th Cir. 1972).

These conclusions, moreover, are particularly appropriate given § 3731's mandate that "[t]he provisions of this section shall be liberally construed to effectuate its purposes."

CONCURRENCE

KETHLEDGE, Circuit Judge, concurring. I join the court's opinion, and make a further observation. One of the many remarkable aspects of this case is that one of the government's lawyers called himself as a witness in the district court and then proceeded to write and sign a brief to this court. The lawyer acted, I am sure, in good faith; but as a result of his dual status, our task has been hampered throughout by the need to sift his sworn testimony in the district court from his unsworn testimony in his brief. *Pro se* cases excepted, counsel should avoid this sort of thing. Once a lawyer gets into a case as a witness, he ought to get out of it as an advocate.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff, v. **RANDE LAZAR, M.D., d/b/a OTOLARYNGOLOGY CONSULTANTS OF MEMPHIS,** Defendant.	Criminal No. 04-20017-D/V

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND GRANTING DEFENDANT'S MOTION TO SUPPRESS ALL EVIDENCE AND DISMISS ALL CHARGES RESULTING FROM SEARCHES UNDER ILLEGAL WARRANTS DATED OCTOBER 9, 2002

(Filed Feb. 15, 2008)

Before the Court is Defendant Rande H. Lazar's ("Lazar") Motion To Suppress All Evidence And Dismiss All Charges Resulting From Searches Under Illegal Warrants Dated October 9, 2002. (hereinafter Mot. to Suppress.) The Court referred this matter to Magistrate Judge Diane K. Vescovo for a Report and Recommendation (hereinafter R&R). On June 13, 2005, Magistrate Judge Vescovo issued a R&R

recommending that Lazar's Motion to Suppress be granted. The Court has conducted a de novo review of the record and finds that the Recommendation is well reasoned. Accordingly, the Court **ADOPTS** the Magistrate Judge's Recommendation, and **GRANTS** the Defendant's Motion to Suppress.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

Lazar was indicted by the grand jury on January 20, 2004 on 115 counts of health care fraud. (R & R at 2.) A superseding indictment was filed on November 19, 2004 charging Lazar with devising and executing a scheme to defraud and obtain money from health care benefit programs. (Id.) The indictment further charged that Lazar falsified or caused to be falsified medical reports to justify billing and billed for procedures that were not performed by him, were not necessary, or were not performed at all. (Id.)

On October 9, 2002, Assistant U.S. Attorney Kevin Whitmore ("Whitmore") and Agent Donald Lee, Jr. presented search warrant applications and supporting affidavits before former Magistrate Judge Daniel Breen to search Lazar's three offices. (Id. at 3.) The applications for the search warrants at issue were filed for the search of Lazar's offices located at 791 Estate Place and 777 Washington Avenue,

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[1] The Court incorporates by reference, Magistrate Judge Vescovo's proposed findings of fact. (R&R at 2-10.)

numbered 02-SW-111 and 02-SW-110, respectively. (Id.; Exs.16, 17.) In the space set aside for the description of the items to be seized, both warrant applications state, "See Attachment A and Attachment B." (Mot. to Suppress, Exs. A & B.) The search warrants likewise reference Attachments A and B in the designated area for the description of the items to be seized. Attachment A is a detailed description of the two premises to be searched. Attachment A does not state the items to be seized. Attachment B lists eight broad categories of items to be seized. In particular, the first category in Attachment B, refers to patient records for patients whose names are not included in the warrant, nor in any list attached or referred to in any part of the search warrants, the applications, or the affidavits.[2] Attachment B failed to include any patients' names, ages, insurance companies, chart numbers, or any other identifying criteria.[3] [sic] (R&R at 5-6.) Furthermore, there is no incorporating language in Attachment B that purports to include any additional attachment as a basis for describing the items to be seized. (Id. at 13.) In addition, no criminal statutes are mentioned in the search warrants or in Attachments A or B. (Id. at 5.)

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[2] The end of the first paragraph of Attachment B describes the items to be seized as: "[a]ny and all documents by whatever means stored . . . including but not limited to patient charts, files, medical records . . . *for the following patients:*" (emphasis added). (Ex. 12.) After the explanatory phrase "for the following patients" and the subsequent colon, no patient names, nor identifying or limiting criteria were listed. (R&R at 5-6.)

The search warrants were executed on the morning of October 10, 2002 at 777 Washington Avenue and 791 Estate Place. (Id. at 8.) At the 777 Washington Avenue office, Agent Mike Geasley provided the office manager with a patient list, purportedly including the names of 125 patients. (Id. at 8-9.) Sixty-eight (68) patient files were seized from the 777 Washington Avenue office location. (Id. at 9.) Agent Diane Lee Lott searched the 791 Estate Place office and returned the next day to make a sketch of the office and a mirror-image copy of Lazar's computer hard-drive. (Id.) As a result of the search at 791 Estate place, sixty-nine patient (69) files were taken, along with sixty (60) CAT scans, three (3) files labeled as attorney's files, six (6) years of Medicare/Medicaid claims, and three (3) backup tapes of billing information. (Id. at 9-10.)

During the suppression hearing before Magistrate Judge Vescovo, Whitmore stated that he discussed the idea of not attaching the patient list to the warrants out of concerns for the privacy of the patients with Judge Breen at the warrant hearing. (Id. at 7; Tr. at 147-148.) However, nothing in the record indicates that Whitmore sought to have Judge Breen seal the patient list. Moreover, Whitmore conceded that there is no language incorporating a list of patient files into the warrant application, the search warrants, nor Attachments A and B. (Tr. at 204-205.)

In his Motion to Suppress, Lazar argues that both warrants were facially defective because they did not describe with particularity the items to be

seized and authorized an unlimited search of all patient records, business records, and computer data. (Mot. to Suppress at 1.) Therefore, Lazar requests that the Court exclude: (1) all patient files, business records, and computer data seized under the warrants; and (2) all evidence, both documentary and testimonial, that the Government subsequently discovered or obtained which is derivative of the items obtained during the searches, including all expert testimony. (Id. at 4.)

In the R&R, Magistrate Judge Vescovo framed the issues as follows: (1) whether the search warrant passed the "particularity test" of the Fourth Amendment; (2) whether the Government could rely on the good faith exception for defective warrants; (3) whether there was probable cause connecting the places to be searched with the items to be seized; and (4) whether the Government could rely upon the inevitable discovery exception to evidence unlawfully obtained. (R&R at 10-23.) Magistrate Judge Vescovo answered these questions in the negative. First, she found that the warrants at issue in this case were facially defective because they violated the Fourth Amendment particularity test, requiring that warrants identify the items to be seized with specificity. (Id. at 10.) (citing U.S. CONST. amend. IV.; *Groh v. Ramirez*, 540 U.S. 551 (2004) (holding that a warrant was lacking in particularity when it provided no description of the type of evidence sought and failed to incorporate by reference an itemized list of items to be seized)). Magistrate Judge Vescovo concluded that

the Lazar warrants did not describe the items to be seized with particularity and there was no language of incorporation to connect the patient list to the search warrants. (Id. at 13-15.)

Second, she found that the Government could NOT rely upon the good faith exception because the warrants' defects were plain from the face of the document and thus outside the scope of the good faith exception. (Id. at 15-17) (citing *United States v. Leon*, 468 U.S. 897, 926 (1986)). Third, the Magistrate Judge determined that the supporting affidavits presented with the search warrants failed to demonstrate probable cause to connect the locations to be searched with the items to be seized because they were unsubstantiated and based on conclusory statements. (Id. at 17-20) (citing *Illinois v. Gates*, 462 U.S. 213, 238-239 (1983). Fourth, she determined that the Government provided no evidence supporting its theory that their investigation methods would have inevitably led to the discovery of the unlawfully seized materials. (Id. at 20-23.)

II. STANDARD OF REVIEW

The district court has the authority to refer certain pre-trial matters to a magistrate judge for resolution. 28 U.S.C. § 636(b); *Callier v. Gray*, 167 F.3d 977, 980 (6th Cir. 1999). Such a referral may designate a magistrate judge to hear and determine non-dispositive pretrial matters, such as a motion to compel or a discovery motion. 28 U.S.C. § 636(b)(1)(A);

Brown v. Wesley's Quaker Maid, Inc., 771 F.2d 952, 954 (6th Cir. 1985). They may also include dispositive matters, such as a motion to suppress evidence in a criminal case or a motion for summary judgment, and evidentiary hearings. 28 U.S.C. § 636(b)(1)(B).

The district court has appellate jurisdiction over any decisions the magistrate judge issues pursuant to a referral for a report and recommendation. 28 U.S.C. § 636(b); Fed. R. Civ. P. 72. The standard of review that is applied by the district court depends upon the nature of the matter considered by the magistrate judge. When a dispositive matter is referred, the magistrate judge's authority extends only to issuing proposed findings of fact and recommendations for disposition. 28 U.S.C. § 636(b)(1)(B) (2000). The district court makes a de novo determination, which entails reconsidering the matter in its entirety, without granting any weight or consideration to the lower court's decision. Fed. R. Civ. P. 72(b); *United States Fidelity and Guaranty Co. v. Thomas Solvent* Co., 955 F.2d 1085, 1088 (6th Cir. 1992); *see United States v. Navarro-Camacho,* 186 F.3d 701, 709 (6th Cir. 1999).

A motion to suppress evidence in a criminal case is a pre-trial matter which falls within one of the "dispositive matters" exceptions of 28 U.S.C. § 636(b)(1)(A). Thus, the Magistrate Judge's authority, in the present case, extends only to issuing proposed findings of fact and recommendations for disposition. Consequently, the Court reviewed this case de novo.

III. ANALYSIS

After a de novo review of the record, the Court finds that the Magistrate Judge's Recommendation is well reasoned. However, the Court will address the Government's claim that the R&R failed to consider post-*Groh*, Sixth Circuit case law which, the Government argues in its objection to the R&R, affirms the constitutionality of the incorporation and accompaniment method used in the Lazar search warrants. (U.S. Resp. And Objection To The Magistrate's R&R. at 27-32.) (hereinafter U.S. Resp. To R&R.) The Government's reliance on this line of cases is misplaced.

In *Baranski v. Fifteen Unknown Agents*, the Sixth Circuit found a warrant to be facially defective because the affidavit describing the items to be seized was referenced in the warrant, but was not attached to the warrant nor in the searching agents' possession at the time of the search. 401 F.3d 419 Nos. 03-5582/5614 (6th Cir. 2005), *vacated*, 452 F.3d 433 (6th Cir. 2006). The Government cites to *Baranski* for the proposition that a faulty search warrant can be cured of defects by incorporation, if the searching agent possessed the attachments describing the items intended to be seized with particularity, at the time of the search. (U.S. Resp. To R&R at 27-28.) Therefore, the Government concludes that the Lazar search warrants were cured because the searching agents possessed the patient lists when they conducted the searches of Lazar's offices on October 10, 2002. However, *Baranski* is not dispositive in this case. First,

Baranski was vacated and granted a rehearing en banc. *Baranski,* 2005 U.S. App. LEXIS 16575 (6th Cir. 2005). Upon rehearing the case, the Sixth Circuit found that the search warrant was not defective because the defendant used adequate language of incorporation in identifying the items to be seized. *Baranski,* 452 F.3d at 439-441. In distinguishing *Baranski* from *Groh,* the Sixth Circuit held that the warrant in *Groh* was facially defective because it failed "to cross-reference the affidavit [specifying the items intended to be seized] at all." *Id.* at 440. (bracketed language added). The *Baranski* court found that a search warrant's failure to incorporate an itemized list by reference leaves the reviewing court to doubt whether the magistrate was cognizant of the scope of the search he was authorizing and "whether the magistrate provided 'written assurance that [he] actually found probable cause to search for, and to seize, every item mentioned in the affidavit.'" *Id.* (internal quotations added.) (citing *Groh,* 540 U.S. at 560.)

The Government also cites to *Sanders v. Parrish* for the proposition that when an expressly incorporated document references a second document, that act is sufficient to incorporate both documents. 2005 WL 1579509, at *416 (6th Cir. Jul. 1, 2005). In *Sanders,* the Sixth Circuit found that the supporting affidavits of a witness and a law enforcement officer were sufficiently incorporated into the search warrant because the warrant, on its face, incorporated the attached affidavits describing with particularity

items to be seized. *Id.* at * 417. Most importantly, in *Sanders,* the curative affidavits were attached to the warrant when the magistrate judge reviewed the warrant and were present during the search. *Id.* at * 413-14.

The present case is distinguishable from both *Baranski* and *Sanders.* The Lazar search warrants did not specify the seizure of any particular patient records and the Government concedes that no language of incorporation exists that links the patient list to the warrant application or the search warrants themselves. Therefore, the defects in the Lazar search warrants were not cured by incorporation.

IV. CONCLUSION

Upon review a de novo review of the parties' briefs, the transcript of the testimony from the May 26, 2005 suppression hearing, and the case record as a whole, the Court **ADOPTS** the Report and Recommendation of the Magistrate Judge. Accordingly, the Defendant's Motion to Suppress is **GRANTED**.

IT IS SO ORDERED this 15th day of February, 2008

s/ Bernice Bouie Donald
BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RANDE LAZAR, M.D., d/b/a OTOLARYNGOLOGY CONSULTANTS OF MEMPHIS, Defendant.	No. 04-20017 DV

REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION TO SUPPRESS ALL EVIDENCE AND TO DISMISS ALL CHARGES RESULTING FROM SEARCHES UNDER ILLEGAL WARRANTS, DATED OCTOBER 9, 2002

(Filed Jun. 13, 2005)

Before the court is the August 27, 2004 motion of the defendant, Rande Lazar, M.D., d/b/a Otolaryngology Consultants of Memphis ("Lazar"), to suppress all evidence seized from his offices pursuant to search warrants dated October 9, 2002, and to dismiss all counts in the indictment resulting directly and derivatively from the searches. The motion was referred to the United States Magistrate Judge for a report and recommendation.

On May 26, 2005, a hearing was held in open court before the undersigned magistrate judge. At the

hearing, the government called four witnesses: Mike Geasley, a criminal investigator with DCIS for the state of Tennessee, who participated in the execution of the search warrants; Jeffrey Knutson, also a criminal investigator with DCIS and who also participated in the execution of the search warrants at issue; Diane Lee Lott, a former agent with the Medicaid Fraud Control Unit of the Tennessee Bureau of Investigation and a participant in the execution of the search warrants at issue, and Assistant U.S. Attorney Kevin Whitmore, who was present when the search warrants were issued. The defense called one witness, Betty Fortney, a former administrative assistant/office manager for Dr. Lazar. For the following reasons, it is recommended that the motion be granted.

PROPOSED FINDINGS OF FACT

Lazar was originally indicted by the grand jury on January 20, 2004. A superseding indictment was filed on November 19, 2005, charging Lazar with devising and executing a scheme to defraud and obtain money from health care benefit programs. The indictment further charges that Lazar falsified or caused to be falsified medical reports to justify billing and billed for procedures that were not performed by him, were not necessary, or were not performed at all.

The government's investigation of Lazar began in July, 2000, after Lazar's ex-office manager, Judiath Lake, filed a *qui tam* lawsuit under the Federal False Claims Act claiming that Lazar was engaged in

scheme to defraud health care benefit programs. On July 29, 2001, almost a year after the *qui tam* case was filed, the government executed a search of Lazar's offices. The authority for that search was alleged to be a federal statute, 42 U.S.C. § 1320a-7, and two federal regulations, 42 C.F.R. §§ 431.107 and 1007.11. The government also served Lazar with a Department of Justice ("DOJ") subpoena which sought twelve specific categories of business records, but did not seek patient files.[1] Over the next several months, Lazar allegedly produced over 20,000 pages of documents pursuant to the DOJ subpoenas.

In October of 2002, the lead case agent from the Tennessee Bureau of Investigation, Donald Lee, Jr., prepared applications and affidavits for search warrants on Lazar's three offices. The search warrants for Lazar's offices located at 791 Estate Place and 777 Washington Avenue, which are at issue in this motion, were numbered 02-SW-110 and 02-SW-111 respectively.[2] The only difference between the two search warrants were the addresses of the locations to be searched. On October 9, 2002, after preparation of the search warrant applications, supporting affidavits, and the search warrants themselves, Agent Lee,

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[1] The legality of the July 29, 2001 search and the authority to use DOJ subpoenas are challenged in another suppression motion filed by Lazar on August 27, 2004. A hearing on that motion has been set for July 21, 2005.

[2] The search warrant for the third office is not at issue because it was never executed.

accompanied by AUSA Kevin Whitmore, presented the search warrant applications, supporting affidavits, and the search warrants to then Magistrate Judge J. Daniel Breen for approval and issuance of the search warrants.

The applications for issuance of the search warrants were signed by Agent Lee. The application for the search warrant for 791 Estate Place stated as follows:

> I *Donald Lee* being duly sworn depose and say: I am a(n) *s/A Tennessee Bureau of Investigation* and have reason to believe that ___ on the person of or *X* on the property or premises known as (name, description and/or location) *Otolaryngology Consultants of Memphis (OCM), 791 Estate Place, Memphis TN 38120* in the *Western* District of *Tennessee* there is now concealed a certain person or property, namely (describe the person or property to be seized) *See Attachment A and Attachment B* which is (state one or more bases for search and seizure set forth under Rule 41(b) of the Federal Rules of Criminal Procedure) *filing False Fictitious Claim, Mail Fraud, Wire Fraud, False Claims Relating to Health Care Matters, and Health Care Fraud* concerning a violation of Title 18 United States Code, Sections(s) *287, 1341, 1343, 1035, & 1347.* The facts to support a finding of Probable Cause are as follows: *See Affidavit.*

Ex. 12, Application and Affidavit for Search Warrant, Case No. 02-SW-110, Western District of Tennessee.

An identical application was filed for the search of 777 Washington Ave, Memphis, TN, in Case No. 02-SW-111, the only difference being the address of the premises.

Agent Lee supported each application with identical twelve-page affidavits setting forth his qualifications, the identification of the locations to be searched, the applicable criminal statutes, the details of the investigation, a general statement regarding the items to be seized, and his belief that the locations to be searched would contain evidence, instrumentalities, and/or fruits of the crimes referenced in his affidavit. Lee's affidavits, as did the applications, referenced an Attachment A and an Attachment B.

Attachment A to each application and affidavit, was a detailed description of the premises to be searched. Attachment B to each application and affidavit set forth eight categories of items to be seized. These categories encompass each and every business and medical record, as well as billing information, in the offices to be searched without any limitation. Indeed, each of the eight paragraphs in Attachment B describing the items to be seized begins with "any and all."

The first paragraph in Attachment B which deals with patient records states that items to be seized include:

> Any and all documents by whatever means stored . . . including but not limited to patient

> charts, files, medical records, . . . for the following patients:"

Id. However, there were no patient names listed after the colon in paragraph one of Attachment B. Nor were any patient names, chart numbers, procedures, ages of patients, insurance companies or any other identifying criteria of patients mentioned in any of the affidavits, applications, and attachments A. There were no criminal statutes mentioned in Attachments A or B either.

The search warrants themselves likewise referenced Attachments A and B. The search warrant stated:

> Affidavit(s) having been made before me by *S/A Donald Lee* who has reason to believe that ____ on the person of or *X* on the premises known as (name, description and/or location) *Otolaryngology Consultants of Memphis (OCM), 791 Estate Place, Memphis TN 38120* there is now concealed certain person or property, namely (describe the person or property) *See Attachment A and Attachment B.* I am satisfied that the affidavit(s) and any record testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

Id. Attachments A and B to the warrant were identical to Attachments A and B to the Applications and Affidavits. No patient names were listed after the

colon in paragraph one of Attachment B. Similarly, patient names, chart numbers, procedures, ages of patients, insurance companies or any other identifying criteria of patients were absent from the search warrants themselves, and both attachments A and B to the search warrants. Nor were any of the criminal statutes mentioned in the search warrants or Attachments A or B to the search warrants.

AUSA Whitmore testified that he was present when the affidavits and applications, attachments A and B, and the warrants were presented to Judge Breen. Whitmore told the court that he created a list of names of specific patients for whom records were to be seized and gave the list to Agent Lee, who in turn presented it to the magistrate judge. Whitmore claimed that he and Judge Breen had a discussion concerning the patient list before the warrants were signed. The substance of this conversation is unknown; however, there was some indication by Whitmore that he discussed with Judge Breen the idea of not attaching the patient list to the affidavits and applications and the warrants out of concern that the names of minor children would be made public. In addition, Whitmore testified that at the time that Agent Lee was under oath, the patient list was a part of the search warrant package presented to the magistrate. Judge Breen signed both warrants, and the searches were executed simultaneously at approximately 10:00 a.m. on October 10, 2002.

During the course of AUSA Whitmore's testimony, it was discovered that there were several

patient lists in existence. *See* Exs. 6a, 6b, 6c, 10, and 15. None of the lists entered into evidence at the hearing were the actual list presented to the magistrate and none of them were identical. In fact, AUSA Whitmore testified that he did not have a copy of the original patient list that was presented to the magistrate judge. Whitmore referred to the patient list attached to the government's response to the present motion as a "working copy" and stated that the attached copy was not the one presented to the magistrate judge. Nor are there any patient lists in the clerk's files for 02-SW-110 or 02-SW-111.

The two locations searched were Lazar's medical offices at 777 Washington Avenue and 791 Estate Place. Agent Mike Geasley, of DCIS, was involved in the execution of the search warrant at 777 Washington Avenue. Geasley testified that he, along with three other agents, entered the office around 10:00 a.m. on the morning of October 10, 2002, and served the warrant upon the office manager, Betty Fortney. The agents chose 10:00 a.m. because they believed it to be the most convenient and least complicated time to conduct the search. The agents were dressed in business attire and their guns were concealed. Before the search began and after the search ended, Agent Jeffrey Knutson videotaped the office, trying not to film any of the patients in the waiting room. Both Geasley and Knutson stated that the office staff was very cooperative during the search. Betty Fortney also stated that the office was not crowded during

the search and that the officers acted in a polite and professional manner.

In order to retrieve the patient files, Geasley provided Betty Fortney with a patient list. This list purportedly included the names of 125 patients. A staff member matched the names with the chart numbers, as the charts were not in alphabetical order, and the agents pulled the charts. Sixty-eight (68) patient files were taken from 777 Washington Avenue. An inventory list was left with Fortney, along with a copy of the search warrant and the attachments A and B. Geasley did not leave a copy of the patient list or the affidavit with Fortney.

Former agent for the Medicare Fraud Control Unit, Diane Lee Lott, testified in regard to the search of Lazar's office located at 791 Estate Place. According to Lott, she documented the entry and exit of the search, collected evidence, sketched the facility and acted as a "taint" agent. Lott took patient files during the search as well as three files labeled attorney's files, documents concerning financial information, including e-mails, and three backup tapes that concerned billing. When asked what authority she had for taking these files, Lott answered that she was under the impression that pursuant to the search warrant, she could take whatever items that may constitute evidence of a crime. Lott stated that the three attorney's files were sealed and delivered to the United States Attorney's Office. On the Wednesday following the search, Lott returned to 791 Estate Place to make a sketch of the office and make a

mirror-image copy of Lazar's computer hard drive. As a result of the search at Estate Place, sixty-nine (69) patient files were taken, along with sixty (60) CT scans, three (3) files that were clearly marked attorney's files, a file containing six (6) years of medicare/medicaid claims, and three backup tapes full of billing information.

In this motion, Lazar requests that the court exclude: (1) all patient files, business records, and computer data seized under the warrants; and (2) all evidence, both documentary and testimonial, that the government subsequently discovered or obtained which is derivative of the items obtained during the searches, including all expert testimony.

PROPOSED CONCLUSIONS OF LAW

I. PARTICULARITY

The first issue before the court is whether the search warrants pass the "particularity test" of the Fourth Amendment. The Fourth Amendment states unambiguously that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly* describing the place to be searched, and the person or *things* to *be seized*." U.S. CONST. amend. IV. Warrants which fail to identify with particularity the items to be seized are considered "general" or "exploratory" warrants as they do not circumscribe the discretion of the executing officer, nor do they "assure[ ] the individual whose property is searched or seized of the lawful authority

of the executing officer, his need to search, and the limits of his power to search. *Groh v. Ramirez,* 540 U.S. 551 (2004) (quoting *United States v. Chadwick,* 433 U.S. 1, 9 (1977)).

Lazar contends that the warrants presented to the magistrate judge were defective "general warrants" and the evidence seized from the offices should be suppressed. Lazar argues that both warrants authorized unlimited searches of all patient records, all business records, and all computer data because they did not describe with particularity the records to be seized.

Lazar contends that by not identifying a single patient by name on the warrant or incorporating by reference a list of patients, the agents exceeded the clear limits of the search warrant. While it is unclear why there was no reference made to a list of patients or no patient list was incorporated, the undeniable fact remains that the warrants did not specify, nor did they authorize, the seizure of any particular patient record.

The government insists that AUSA Kevin Whitmore and Agent Lee presented a patient list to the magistrate judge for his consideration prior to the signing of the warrants. However, AUSA Whitmore testified that he did not presently have the original patient list that the magistrate judge received nor is the original in the clerk's file. The government thus asks the court to rely on a patient list, even though its whereabouts are unknown, that was not

referenced in the warrants, attached to the warrants or incorporated into the warrants to save the warrants from the particularity requirement.

The fact that the magistrate judge may have viewed a patient list before signing the warrants does not save the warrants from its facial invalidity. In a recent Supreme Court decision, the Court held that a warrant was lacking in particularity because it provided no description of the type of evidence sought. *Groh v. Ramirez,* 540 U.S. 551 (2004). The facts in this case are similar to the facts in *Groh.* In that case, Groh, an ATF agent, applied for a warrant to search Ramirez's ranch for a large stock of rifles, grenades, and rocket launchers. The agent supported his application for a warrant with a detailed affidavit that set forth the basis for his belief that the items were on the ranch. A magistrate judge signed the warrant after reviewing the application and affidavit. The warrant was not specific in regard to the items to be seized. The description of the items to be seized only indicated where the items could be found and did not incorporate by reference the itemized list contained in the application. Despite the fact that the application adequately described the things to be seized, the Court held that the warrant was facially invalid because the warrant did not incorporate other documents by reference and neither the affidavit nor the application accompanied the warrant.

In the present case, neither of the search warrants or the attachments referenced on the face of the search warrants contain a list of patient names, nor

do the affidavits or the applications. In the space set aside for a description of the items to be seized, the warrants merely refer to Attachments A and B. Attachment A describes the premises to be searched, not the items to be seized. Attachment B describes the items to be seized. The first category in Attachment B refers to patient records for patients whose names are not included in the warrant or in any list that is attached or referred to in any part of the search warrants or the applications or affidavits. Unless the particular patient list created by AUSA Whitmore was set forth in the warrant, or at least incorporated by reference, there can be no assurance that the magistrate judge actually found probable cause to search for, and to seize, the patient records listed on the patient list. In effect, the warrant purports to authorize a search of all patient records at Lazar's offices, despite the fact that the government believed that only specific records were evidence of criminal activity as demonstrated by AUSA Whitmore's creation of a patient list.

It can hardly be argued that where the Supreme Court is unwilling to uphold a warrant where the items to be seized are described in an unincorporated application, that this court should allow the government to rely on a patient list which was not incorporated in either the applications or search warrants in order to save the search warrants from the particularity requirement of the Fourth Amendment. Here, the warrants were obviously deficient and plainly

invalid so as to render the searches warrantless and thus unconstitutional.

Lazar further contends in addition that every category in Attachment B violated the Fourth Amendment's particularity requirement because they were left unlimited in scope and duration. It is undisputed that Attachment B contains no limitation as to any relevant dates of items to be seized. At the time the search warrants were issued, the government had been investigating Lazar for almost two years. Rather than specify exactly which documents it was seeking, the government chose to use descriptions of items to be seized that referenced no specific patients, no specific transactions, and most importantly, no time frame. The Sixth Circuit has held that "[f]ailure to limit broad descriptive terms by relevant dates, when such dates are available . . . , will render a warrant overbroad." *United States v. Ford,* 184 F.3d 566 (6th Cir. 1999). While a time frame was mentioned in the affidavits, the affidavits were not incorporated into the warrants and there was testimony that the affidavits were not presented to the office manager at the time of the search.

Accordingly, the court concludes that the categories of items listed lacked the requisite particularity. The words used in Attachment B to describe the items to be seized left room for the agents to seize whatever items they wished without limitation. Thus, it is submitted that the warrants at issue failed to conform to the particularity requirement of the Fourth Amendment and therefore the searches

conducted on October 9, 2002, of Lazar's office premises were unconstitutional.

II. GOOD FAITH EXCEPTION

If the warrants are in fact defective, it is submitted by the government that this case falls under the "good faith" exception of *United States v. Leon*, 468 U.S. 897, 926 (1986). Under Leon, when an officer, acting with objective good faith, has obtained a search warrant from a detached and neutral magistrate and has acted within its scope, the results of the search are not excludible even if the affidavit is later found to be insufficient to establish probable cause, unless (1) the issuing magistrate was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth; (2) the issuing magistrate failed to act in a neutral and detached fashion and merely served as a rubber stamp for the police; (3) the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or where the warrant application was supported by nothing more than a bare bones affidavit; or (4) the warrant was facially deficient in that it failed to particularize the place to be searched or the things to be seized. *United States vs. Leon*, 468 U. S. 897, 926 (1986).

Lazar contends that pursuant to *United States v. Leon*, 468 U.S. 897 (1984) and *Groh v. Ramirez*, 540 U.S. 551 (2004), the good faith exception does not

apply in this case because the warrants were facially defective "general warrants." Because the government's agents prepared an invalid warrant by not listing patient names in ¶ 1 of Attachment B, the government cannot argue that it agents reasonably relied on the magistrate judge's finding that the warrant contained an adequate description of the things to be seized and was therefore valid. *Id.* The exception cannot be used where a deficiency is not brought to the magistrate judge's attention. *Id.* at 1292 n.4. In *Groh,* the Court stated that "petitioner did not alert the Magistrate to the defect in the warrant that petitioner had drafted, and we therefore cannot know whether the Magistrate was aware of the scope of the search he was authorizing. Nor would it have been reasonable for petitioner to rely on a warrant that was so patently defective, even if the Magistrate was aware of the deficiency." *Id.*

In the present case, neither Agent Lee nor any other agent involved in the search did anything to point out the deficiency, despite the fact that it was obvious. Instead, the agents seized numerous patient-related records where not a single one was particularly authorized. Accordingly, the government's argument that the good-faith exception saves the invalid searches is not well-taken.

III. PROBABLE CAUSE CONNECTING THE LOCATIONS TO BE SEARCHED

Lazar contends that the affidavits of Agent Lee that were presented with the search warrants contain unsupported conclusory statements attempting to connect the places to be searched with the items to be seized. Lazar maintains that there is no substantiated information present in the affidavit that connects the records to be seized in Attachment B to the two locations that were searched and that the agents' mere belief that Lazar controlled the two locations is not enough to satisfy the requirement of probable cause, and therefore the evidence obtained from these searches should be suppressed. Alternatively, Lazar argues that information given to the affiant by Judiath Luke or Dr. Neil Beckford was stale as these individuals had not worked for Lazar for over a year prior to the searches at issue. Moreover, Lazar claims that just because the government had entered his offices and seized records before under different authority, does not mean that he still maintained his records at those locations. Instead, Lazar argues that with the knowledge that the government could seize records any time it wanted, he would have had an incentive to move the records to a different location.

The government did not attempt to refute the arguments made by Lazar on this point in its response brief, nor did it mention the lack of probable cause to connect the locations to the items to be seized during oral argument. Rather, the government attempts to persuade the court that probable cause

existed to tie the locations to the items to be seized by describing the qualifications of Agent Lee, the knowledge of Judiath Lake, Lazar's ex-office manager, concerning Lazar's alleged billing practices, and Dr. Neil Beckford's knowledge of Lazar's alleged billing practices. This information does nothing, however, to link the records to be seized to the locations to be searched.

According to the leading case, *Illinois v. Gates*, 462 U.S. 213 (1983), a magistrate judge's task in finding probable cause is "simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* at 238. The duty of the reviewing court is to determine whether the magistrate judge had a substantial basis for concluding that probable cause existed. *Id.* at 238-39. A mere conclusory statement linking the place to be searched with the items to be seized will not suffice. *Id.* at 239.

In the present case, the affidavit of Agent Lee states that Dr. Lazar owns and operates the two locations to be searched. Attachment A provides pictures of the two locations and the pictures indicate that Lazar has offices in these locations. There are however no dates indicating when these pictures were taken. The only other mention of one of the locations in the affidavit comes from Judiath Luke's statement to Agent Lee that "the fellows worked

almost exclusively in OCM's office at 777 Washington Street, Memphis, Tennessee." There is no language, express or implied, in the affidavit that connects the items to be seized with the locations that were searched.

Accordingly, Agent Lee's statements that "there is probable cause to believe that the locations described herein as well as Attachment A, contain evidence, instrumentalities and/or fruits of crimes," is so conclusory and unsupported to the point that the magistrate judge could not have determined that probable cause existed to connect the locations to be searched with the items to be seized. Consequently, it is recommended that all items seized from either location be suppressed.

IV. INEVITABLE DISCOVERY

The government insists that the inevitable discovery rule applies in this case. Under the inevitable discovery rule, illegally seized evidence may be admitted despite the exclusionary rule when the government can demonstrate either the existence of an independent, untainted investigation that inevitably would have uncovered the same evidence or other compelling facts establishing that the disputed evidence inevitably would have been discovered. *Nix v. Williams*, 467 U.S. 431 (1984). "The government can satisfy its burden by showing that routine procedures that [it] would have used regardless of the illegal search would have resulted in the discovery

of the disputed evidence." *U.S. v. Ford*, 184 F.3d 566 (6th Cir. 1999).

Prior to the issuance of the October 9, 2000 search warrants, the government had served Lazar with pre-indictment DOJ subpoenas that sought information in connection with the government's investigation. Lazar had begun to comply with the government subpoenas prior to the October 10 searches by producing over 20,000 pages of documents. The government maintains that it could have obtained the medical records of patients or other documentation where needed by use of DOJ subpoenas or grand jury subpoenas. According to the government, subpoenas are routine procedures for obtaining such information. The government claims, however, that it received reliable information that if it served DOJ subpoenas seeking patient records that Lazar would attempt to alter the records to conceal his fraudulent billing practices. In response to this information, the government secured search warrants to obtain patient records instead of using subpoenas.

Lazar contends that the government does not have routine procedures for obtaining evidence in the context of a criminal healthcare-fraud investigation. As such, Lazar maintains that the government is barred from arguing that it would have inevitably discovered the patient records via subpoenas.

It is also submitted by Lazar that the court should reject the prosecution's invitation to make a

grand jury or DOJ subpoena an "insurance policy" to protect against an illegal search. The Ninth Circuit case of *Center Art Galleries-Hawaii v. United States,* 875 F.2d 747 (9th Cir. 1989) and the Second Circuit case of *United States v. Roberts,* 852 F.2d 671 (2nd Cir. 1988) are directly on point. In both cases, the government argued that it would have inevitably discovered information that was seized pursuant to an invalid search warrant via a subpoena that had been issued either before or after the issuance of the warrant. Quoting the Second Circuit's decision in *Roberts,* the Ninth Circuit held that:

> The mere fact that the government serves a subpoena, however, does not mean that it will obtain the documents it requests. A subpoena can be invalid for a variety of reasons, as when it is unduly burdensome, . . . , when it violates the right against self-incrimination, . . . , or when it calls for privileged documents. Moreover, we can deplore but not ignore the possibility that the recipient of a subpoena may falsely claim to have lost or destroyed the documents called for, or may even deliberately conceal or destroy them after the service of the subpoena. Thus, the government cannot show that its subpoena would have inevitably resulted in the discovery of the suppressed documents.

Center Art Galleries-Hawaii v. United States, 875 F.2d 747, 754 (9th Cir. 1989) (citations omitted).

In this case, the court finds the case law of the Second and Ninth Circuits to be persuasive. Thus, it

is recommended that the court reject the government's inevitable discovery argument, particularly in light of the fact that the government acknowledged that it had information suggesting that Lazar would alter patient records if faced with a subpoena.

V. GOVERNMENT AGENT'S CONDUCT DURING THE SEARCHES

In Lazar's written motion, he alleges that agents' execution of the search warrants was outrageous and conscience shocking. Despite making these assertions in the written pleadings, Lazar decided not to pursue the allegations at the hearing on May 26, 2005. A copy of the video-taped search was provided to defense counsel by the government and a copy was entered into evidence as Court Exhibit 11. The issue now appears to be moot.

CONCLUSION

In sum, the search warrants fail to conform to the Fourth Amendment's requirements of particularity. That being the case, the search warrants are facially invalid and did not provide the authority for a constitutional search of either of Lazar's offices. It is thus recommended that the evidence seized during these searches be suppressed.

Furthermore, the affidavit presented to the magistrate judge, along with the attachments, do not provide a sufficient basis for the determination that the items to be seized were present at the locations to

be searched. Thus, the searches were not based on a finding of probable cause. Consequently, the items seized from the searches must be suppressed.

The court also rejects the government's assertion that either the good-faith exception or the inevitable discovery doctrine applies in this case.

Accordingly, it is recommended that the items seized in the government's searches conducted at 777 Washington Avenue and 791 Estate Place on October 10, 2002, be suppressed.

Respectfully submitted this 13th day of June, 2005.

/s/ Diane K. Vescovo
DIANE K. VESCOVO
UNITED STATES
MAGISTRATE JUDGE

No. 08-5653

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. RANDE H. LAZAR, Defendant-Appellee.	)	ORDER (Filed Sep. 2, 2010)

BEFORE: GRIFFIN and KETHLEDGE, Circuit Judges; and CARR,* District Judge.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

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* Hon. James G. Carr, Chief United States District Judge for the Northern District of Ohio, sitting by designation.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Cr. No. 04-20017

RANDE LAZAR, M..D., d/b/a OTOLARYNGOLOGY CONSULTANTS OF MEMPHIS

Defendant.

NOTICE OF APPEAL

(Filed May 29, 2008)

Notice is hereby given that the United States of America appeals to the United States Court of Appeals for the Sixth Circuit from the district court's Order granting the Defendant's motion to suppress evidence, issued on February 15, 2008. The district court extended time until April 15, 2008, for United States to file its appeal.

The United States certifies that this appeal is not taken for purpose of delay, and that the evidence suppressed by the district court's order is substantial proof of facts material to the trial of this case.

DATED: April 14, 2008.

Respectfully Submitted,

DAVID KUSTOFF
UNITED STATES ATTORNEY
By:

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CERTIFICATE OF SERVICE

I, Kevin P. Whitmore, Assistant United States Attorney for the Western District of Tennessee, hereby certify that a copy of the foregoing memorandum has been mailed, first class postage pre-paid, to Steven E. Farese, Farese, Farese & Farese, PA, P.O. Box 98, Ashland, Mississippi 38603; Marc N. Garber, The Garber Law Firm, P.C., 3939 Roswell Road NE, Suite 265, Marietta, Georgia 30062-6226.

S/ kevin whitmore
KEVIN WHITMORE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Cr. No. 04-20017

RANDE LAZAR, M..D., d/b/a OTOLARYNGOLOGY CONSULTANTS OF MEMPHIS

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